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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 40

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1935
CERTIORARI GRANTED JUNE 3, 1935

SUPREME COURT OF THE UNITED STATES

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2 In United States District Court for the Southern Division of the Northern District of Alabama

September term, 1934

Information for violation of section 206, title 26, U. S. C. A. (sec. 701 of the Revenue Act of 1926)

THE UNITED STATES OF AMERICA,
SOUTHERN DIVISION OF THE
NORTHERN DIVISION OF ALABAMA, *ss*:

First count: Violation of section 206, title 26, U. S. C. A. (section 701 of the Revenue Act of 1926).

Jim C. Smith, attorney of the United States for the Northern District of Alabama, who in this behalf prosecutes in the name of the United States, and for the United States, comes here into said court on this 21st day of November 1934, in his own proper person, and for the United States gives the said court here to understand and be informed that, as shown by the affidavit and complaint hereto annexed, one Gus L. Constantine, alias Dr. Gus, whose name is otherwise unknown to said attorney, heretofore, to wit, on
3 or about the 8th day of October 1934, at or near Birmingham, in the county of Jefferson, State of Alabama, in the division and district aforesaid, and within the jurisdiction of this court, did then and there unlawfully carry on the business of a retail dealer in malt liquor, without first having paid the special excise tax of $1,000 as required by section 701 of the Revenue Act of 1926, and section 206, title 26, U. S. C. A.; that at the time and place aforesaid, the laws of the State of Alabama prohibited the carrying on of the business of a retail dealer in malt liquor, and the carrying on of such business was contrary to the laws of the State of Alabama; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Whereupon, said attorney of the United States, who prosecutes as aforesaid for the United States, prays the consideration of the court here in the premises, and that due process of law may be awarded against the defendant, in this behalf to make his answer to said United States concerning the premises aforesaid.

JIM C. SMITH,
United States Attorney.

4 *Order*

Upon consideration of the above and foregoing and for good cause shown, it is ordered by the court that:

Leave to file this information is granted, and upon motion of the United States attorney, it is ordered that:

A capias for the arrest of the defendant be issued as prayed for.

This the 21st day of November 1934.

W. I. GRUBB,
United States District Judge.

[*Duly sworn to by James T. Rogers; jurat omitted in printing.*]

5 IN UNITED STATES DISTRICT COURT

No. 8767

UNITED STATES OF AMERICA

v.

GUS L. CONSTANTINE

Demurrers

Filed December 3, 1934

Now comes the defendant in the above cause and demurs to the information heretofore filed herein, the basis of this proceeding, and to each count thereof, separately and severally, assigning the following separate and several grounds of demurrer as to each, that is is to say:

1. For that section 206, title 26, U. S. C. A., violates the Constitution of the United States, and is accordingly invalid.

2. For that said section violates the provisions of article I, section 8, of the Constitution of the United States in that the levy therein provided for is not uniform throughout the United States.

3. For that said section violates the provisions of the tenth
6 amendment to the Constitution of the United States, in that it seeks to exercise powers reserved to the several States.

4. For that the Federal Government has no plenary or police power whatsoever over subject matter of beer, the so-called "tax" imposed by said section being a penalty to coerce the people in dry States to act as Congress wishes them to act in respect to a matter completely the business of the several State governments.

5. For that prior to the adoption of the eighteenth amendment of the Constitution of the United States, and since the repeal of said amendment which became effective December 5, 1933, neither the Federal Government nor Congress has any power with respect to the manufacturer or sale of alcoholic beverages, except the power of taxation, and the Federal Government has had no so-called "police

power" over said subject matter since the repeal of said amendment.

6. The levy set up by said section is a penalty and not a tax.

7. The Federal Government is without right to imprison one of its citizens for failure to pay to it a penalty.

8. In this action the United States seeks to imprison one of its subjects for debt for violation of the Bill of Rights, part of the Constitution of the United States.

9. The Supreme Court of the United States has specifically
7 held in the case of United States v. LeFrance, (51 Supp. Ct. 278; U. S. 568), that the so-called "tax" imposed by said section is in truth and in fact a penalty, in the nature of punishment for an act criminal in nature and is not a tax.

10. For that the levy imposed by said section is but an abortive attempt on the part of the Federal Government to intermeddle with the internal affairs of the several States.

11. For that said section seeks to levy a penalty upon a penalty.

12. For that from aught that appears from said information the defendant herein has paid to the United States within the period mentioned in the information all of the taxes provided by sections 202 to 205, both inclusive, title 26, U. S. C. A.

13. For that during the period complained of in said information the defendant had acted in good faith on the written information given him by the United States through the collector of internal revenue for the district of Alabama in the attached circular letter, marked "Exhibit A", and by reference made part hereof as fully as though the same were set forth herein in detail, and had paid to the United States all of the taxes as therein provided.

14. For that said information fails to show that the collector of internal revenue had in his possession a stamp covering the levy set up by said section which he could have delivered over to the defendant had the defendant tendered to him the $1,000.00 therein provided to be paid as an alleged "excise tax."

8 15. For that said section seeks to delegate to the several States the power to impose and fix the amount of excise taxes to be paid to the United States.

16. For that said section is dependent for its effectiveness upon the acts of the legislatures of the several States.

17. For that the said alleged excise tax is to be levied only at the pleasure of the people of the several States speaking through their respective State legislatures.

18. For that the facts set forth in said information and/or complaint fail to charge this defendant with any crime punishable by fine and/or imprisonment under any valid statute of the United States.

19. For that no sufficient facts are set forth in the said information and/or complaint to authorize the arrest of the defendant herein.

20. The levy set up by said section has been repealed by subsequent acts of the Congress of the United States.

21. For that it is not shown that the malt liquor sold contained more than 3.2% alcohol by volume.

22. For that the said levy has been repealed, if not in express words, by implication by the provisions of the act of Congress approved March 22, 1933, codified as section 506–C, title 26, U. S. C. A.

23. For that the said levy was repealed and/or rendered inoperative by the adoption of the twenty-first amendment to the Constitution of the United States.

9 24. For that it is not shown that the malt liquor sold contained more than one-half of one per cent alcohol by volume.

25. For that the court judicially knows that at the time and place alleged in said incorporation the laws of the State of Alabama did not prohibit the carrying on of the business of a retail dealer in malt liquor containing not more than one-half of one per cent, and it is not alleged that defendant sold or offered for sale malt liquor containing more than one-half of one per cent alcohol.

26. For that it is not averred or alleged that the defendant did unlawfully carry on the business of a retail dealer in malt liquor containing more than one-half of one per cent alcohol.

27. For that the court judicially knows that at the time and place alleged in said information the laws of the State of Alabama did not prohibit the carrying on of the business of a retail dealer in malt liquor, but merely regulated the amount of alcohol to be contained in such malt liquor.

28. For that said section is unconstitutional and void in that by its terms Congress seeks to delegate its legislative powers to the several States, Territories, or districts and even to the municipalities and localities therein.

29. For that said section 206, title 26, U. S. C. A., imposes a penalty which was repealed with the repeal of the eighteenth amendment.

30. For that said section is an unwarranted delegation by Congress of its legislative powers.

10 31. For that said section imposes an excise tax that is not uniform throughout the United States.

32. For that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, soon after said section 206, title 26, U. S. C. A., became effective, published Treasury Department Regulation 3911 in which it was specifically held that said levy was a penalty and not a tax. Said regulation was effective as of the various days and dates mentioned in the information hereinbefore referred to, the basis of this proceeding.

33. For that the said code section in its present form was first adopted February 26, 1926, and became effective on and after July 1, 1926. On July 30, 1926, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury of the United States, under power in him vested by Federal Statute, issue a Treasury Department regulation, amplifying the said section, de-

fining its intent and purpose, and providing for its enforcement, denominated as Treasury Department Regulation 3911; in this regulation the levy here in question was declared to be a penalty and not a tax. Said regulation remained in force and effect until about October 1, 1934, when the Commissioner of Internal Revenue issued instructions to the collector of internal revenue for the District of Alabama that said levy was a true tax and not a penalty.

34. For that said section is in violation of the fifth amend-
11 ment to the Constitution of the United States in that it seeks to deprive citizens of the United States of their property without due process of law.

WILLIAM S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

Order of court

Demurrers, overruled and disallowed, defendant excepts, this December 3rd, 1934.

W. I. GRUBB,
U. S. District Judge.

Exhibit A to demurrer

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Birmingham, Ala.

Official seal and stamp.

Office of the collector, District of Alabama.

In replying refer to all beer and liquor dealers.

There is enclosed herewith form 11, on which you are privileged to make application for special tax stamp as a dealer in alcoholic beverages.

The Government's fiscal year ends on June 30, 1934, and all current stamps expire on that date. If alcoholic beverages are sold during the month of July and no stamp has been purchased allowing such sales, on or before July 30, the dealer automatically be-
12 comes delinquent and will be subject to an ad valorem penalty of 25%, in addition to specific penalties provided for in the United States Statutes.

The rates for the fiscal year beginning July 1, 1934, and ending June 30, 1935, are as follows:

Retail liquor dealer	$25.00
Retail malt liquor dealer (beer)	20.00
Wholesale liquor dealer	100.00
Wholesale malt liquor dealer	50.00

Retail dealers are those who deal in quantities of less than five gallons. Wholesale dealers are those who deal in quantities of more than five gallons, except that one possessing a stamp as a wholesale

dealer is not permitted to deal in quantities of less than five gallons, and retail dealers are not permitted to deal in quantities of more than five gallons.

It will be noticed that on the enclosed application form 11, applicants are required to give a specific address as to the location of their business. If a stamp is issued by the office of the collector of internal revenue at a specific address, the stamp so issued is only good when used at the given address, unless the address is changed at the office of the collector of internal revenue from which it was issued.

In making application for special tax stamp, please remit with cash, money order or certified check, inasmuch as personal checks are not valid unless certified by your banker. Applications must be sworn to in the presence of a notary public or other eligible officer.

Any inquiries concerning beer or liquor dealers' stamps should be directed to the collector of internal revenue, miscellaneous tax division, Birmingham, Alabama.

HARWELL G. DAVIS,
Collector.
By HUGH W. CARDON,
Acting Chief, Miscellaneous Tax Division.

HWC:EB

13 In United States District Court

Motion to strike

Filed December 3, 1934

Now comes the defendant in the above cause and moves to quash and/or strike the information heretofore filed herein by Jim C. Smith, United States attorney, and the order made and entered thereon by the Honorable W. I. Grubb, United States district judge, and as grounds for said motion, assigns separately and severally the following:

The defendant assigns separately and severally in support of this motion each and every ground of demurrer heretofore set up and assigned to the said information, the basis of this proceeding.

W. S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

Order of court

Motion disallowed, and denied, defendant excepts, this December 3rd, 1934.

W. I. GRUBB,
U. S. District Judge.

14 In United States District Court

Waiver of jury

Filed December 3, 1934

Trial by jury is hereby waived by the defendant. This the 3rd day of December 1934.

WILLIAM S. PRITCHARD,
Attorney for Defendant.

Consented to by

JIM C. SMITH,
United States Attorney.

In United States District Court

Defendant's plea of not guilty

Filed in open court December 3, 1934

Comes now the defendant in the above-styled and numbered cause and for answer to the information heretofore filed therein, pleads not guilty; this the 3rd day of December 1934.

WILLIAM S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

15 In United States District Court

Stipulation of facts

Filed December 3, 1934

Subject to legal objections it is agreed by and between the parties hereto that the defendant for the period of time from July 1st, 1933, to June 30th, 1934, was a retail dealer in malt liquors in the city of Birmingham, Jefferson County, Alabama, and that he paid to the collector of internal revenue the sum of twenty dollars ($20.00) in payment of tax stamps as required by paragraph (c) of section 205, title 26, U. S. C. A.; that for the period of time from July 1st, 1934, to June 30, 1935, the defendant registered with the collector of internal revenue as a retail liquor dealer and paid to such collector the sum of twenty-five dollars ($25.00) as required by paragraph (a) of section 205, title 26, U. S. C. A.; and that at the time stated in the information in this case, the defendant was a retail dealer in malt liquors containing more than one-half of one percent alcohol, and that in connection with the operation of his restaurant in the city of Birmingham, and at the time stated in the information in this case, he daily retailed malt liquors

containing more than one-half of one percent alcohol; that at the time stated in such information, it was contrary to the laws of the city of Birmingham, in which city the defendant operated his
16 said restaurant and in connection therewith sold at retail malt liquors, for a person to engage in the business of and be a retail dealer in malt liquors containing more than one-half of one percent alcohol, and was likewise contrary to the laws of the State of Alabama for the defendant to carry on the business of a retail dealer in malt liquors containing more than one-half of one percent alcohol; that the conduct of the defendant in being such retail malt-liquor dealer was a violation of the laws of the State of Alabama and also the laws of the city of Birmingham, Alabama, in which city he engaged in such business; that the defendant had not at any time paid the one thousand ($1,000.00) dollars prescribed in section 206, title 26, U. S. C. A., and that he was carrying on the business alleged in the information without having first paid such $1,000.00.

That defendant received from the collector of internal revenue shortly prior to the beginning of each fiscal year herein mentioned a circular substantially similar to the circular attached hereto, marked "Exhibit A", and by reference made a part hereof. Harwell G. Davis, collector of internal revenue for the district of Alabama, did not have in his possession or under his control the $1,000 liquor stamp until the 27th day of November 1934. No such stamps were shown to be in existence in any catalogue of stamps issued by the United States prior to the 13th day of September 1934. At the time when defendant purchased each of the stamps herein
17 mentioned, defendant testifies he was told by the agent of the collector of internal revenue to whom payment was made, that the tax shown in the attached circular, exhibit A hereto, was the only tax or license he was required by the United States to pay for the privilege of dealing at retail in said malt liquors in the said city of Birmingham, and this the collector and agent deny, defendant received from the collector's office the attached letter addressed to all beer and legal dealers.

The said code section in its present form was first adopted February 26, 1926, and became effective on and after July 1, 1926. On July 30, 1926, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States, under power in him vested by Federal statute, issued a Treasury Department regulation, amplifying the said section, defining its intent and purpose and providing for its enforcement, denominated as Treasury Department Regulation 3911. Copy of excerpt of said regulation is attached hereto, marked "Exhibit B", and by reference made part hereof as fully as though the same were set forth herein in detail. Said regulation remained in force and effect until on or about the 13th day of September 1934, at which time the Commissioner of Internal Revenue issued new instructions to the collector of internal

revenue for the district of Alabama, advising him that said levy was a true tax and not a penalty, copy of excerpt from which is hereto attached, marked "Exhibit C."

18 No demand was ever made by the collector of internal revenue for the district of Alabama upon this defendant, for the payment of the said $1,000 levy until about October 1st, 1934.

This the 3rd day of December 1934.

JIM C. SMITH,
United States Attorney.

WILLIAM S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

Exhibit A to stipulation of facts

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Birmingham, Ala.

Official seal and stamp.
Office of the collector, district of Alabama.
In replying refer to—

To all beer and liquor dealers.

There is enclosed herewith form 11, on which you are privileged to make application for special tax stamp as a dealer in alcoholic beverages.

The Government's fiscal year ends on June 30, 1934, and all current stamps expire on that date. If alcoholic beverages are sold during the month of July and no stamp has been purchased allowing such sales, on or before July 30, the dealer automatically becomes

19 delinquent and will be subject to an ad valorem penalty of 25%, in addition to specific penalties provided for in the United States statutes.

The rates for the fiscal year beginning July 1, 1934, and ending June 30, 1935, are as follows:

Retail liquor dealer	$25.00
Retail malt liquor dealer (beer)	20.00
Wholesale liquor dealer	100.00
Wholesale malt liquor dealer	50.00

Retail dealers are those who deal in quantities of less than five gallons. Wholesale dealers are those who deal in quantities of more than five gallons, except that one possessing a stamp as a wholesale dealer is not permitted to deal in quantities of less than five gallons, and retail dealers are not permitted to deal in quantities of more than five gallons.

It will be noticed that on the enclosed application Form 11, applicants are required to give a specific address as to the location of their business. If a stamp is issued by the office of the collector of internal revenue at a specific address, the stamp so issued is only good when used at the given address, unless the address is changed at the

office of the collector of internal revenue from which it was issued.

In making application for special tax stamp, please remit with cash, money order, or certified check, inasmuch as personal checks are not valid unless certified by your banker. Applications must be sworn to in the presence of a notary public or other eligible officer.

Any inquiries concerning beer or liquor dealers' stamps should be directed to the collector of internal revenue, miscellaneous tax division, Birmingham, Alabama.

HARWELL G. DAVIS,
Collector.

By HUGH W. CARDON,
Acting Chief, Miscellaneous Tax Division.

HWC:EB

20 *Exhibit B to stipulation of facts*

Excerpt and summary from Treasury Department Regulation 3911, approved by the Secretary of the Treasury, and published as of July 30, 1926, as the same relates to section 701, of the revenue act of 1926; section 206, title 26, U. S. C. A.

(T. D. 3911)

Treasury Department officers and Commissioner of the Internal Revenue, Washington, D. C.

Prohibition—Assessment of taxes.

To: Prohibition administrators, collectors of internal revenue, and others concerned:

Subject of internal revenue and prohibition taxes are divided into two classes:

1. Internal revenue taxes proper; that is, taxes generally recognized as such.

2. Those while in the nature of internal revenue taxes are necessarily held to be penalties, "and must be collected through the United States courts."

The following is list classed as taxes:

Retail dealers in malt liquors	$20.00
Wholesale dealers in malt liquors	50.00

The following is list classed as penalties:

"Under section 701 of the revenue act of 1926. A special tax of $1,000 on any person carrying on retail business of dealer in malt liquors contrary to laws of State or Territory."

21 "All outstanding proposals of assessments of this class will be immediately withdrawn by collectors and forwarded to the United States attorney through the administration in whose administrative district their collection district lies."

All liens on the property of taxpayers against whom assessments have been made of this class of cases should be released.

"Those designated as penalties, such taxes will be carefully scheduled, summarized, and reported to the United States attorney for any action he may bring."

(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Approved July 30, 1926.

(Signed) G. B. WILSON,
Acting Secretary of the Treasury.

Exhibit C to stipulation of facts

Prior to the receipt of the $1,000 special excise tax stamps, collectors of internal revenue may accept payment of the tax and issue the stamps at a later date. While section 3183 of the Revised Statutes prohibits the issuance of a receipt in lieu of a stamp, Treasury Decision No. 2341 holds in effect that a taxpayer is entitled to some evidence of payment when he presents a remittance to an internal-revenue officer in satisfaction of a special tax and it is not possible to issue the special tax stamp immediately. It will, therefore, be permissible for collectors to issue receipts on form 1, which receipts will be construed as merely evidence of payment and will not be in lieu of the $1,000 special excise tax stamp.

22 In United States District Court

Findings of fact and conclusions of law presented by defendant and order of court thereon

Filed in open court December 3, 1934

From the evidence offered on the trial of this cause the court specially finds the facts herein to be:

I

Gus L. Constantine, the defendant herein, for the period of time from July 1, 1933, to June 30, 1934, operated a restaurant in the city of Birmingham, in connection with which he daily sold malt liquors (beer) at retail in the city of Birmingham, Jefferson County, Alabama. Throughout said period he was a retail dealer in malt liquors in said city. Prior to July 1st, 1933, he paid the tax, and secured stamps as provided by the provisions of section 205, (c) title 26 U. S. C. A.

II

Within the time as provided by paragraph (c), section 205, title 26, U. S. C. A. defendant paid to the collector of internal revenue for the district of Alabama, all of the tax as therein provided and secured the requisite stamps. On or about July 1, 1934, de-

23 fendant registered with the said collector of internal revenue as a retail liquor dealer, and paid to such collector the sum of $25.00 as required by paragraph (a), section 205, title 26, U. S. C. A., being the tax therein required, for the period July 1, 1934, to June 30, 1935.

III

At the time stated in the information, the basis of this proceeding, it was contrary to the laws of the city of Birmingham, and contrary to the laws of the State of Alabama, in which city and State the defendant operated his restaurant and sold at retail malt liquors, for a person to engage in and be a retail dealer in malt liquors.

IV

The defendant herein at no time paid the $1,000 prescribed in section 206, title 26, U. S. C. A. He carried on the business alleged in the information, in violation of the laws of the said city of Birmingham and State of Alabama without having paid the said $1,000 as prescribed in said section.

V

The defendant received from the collector of internal revenue for the district of Alabama, shortly prior to the beginning of each
24 of the fiscal years herein mentioned, a circular, exhibit A, to the stipulated facts filed herein, providing among other things:

"The rates for the fiscal year beginning July 1, 1934, and ending June 30, 1935, are as follows:

Retail liquor dealer	$25.00
Retail malt liquor dealer (beer)	20.00
Wholesale liquor dealer	100.00
Wholesale mart liquor dealer	50.00"

VI

The said collector of internal revenue did not have in his possession or under his control the $1,000 liquor stamp provided for in said section 206, title 26, U. S. C. A., until November 27, 1934. No such stamp was shown to be in existence in any catalogue of stamps issued by the United States prior to September 13, 1934. No demand was ever made by the collector of internal revenue for the district of Alabama, or any other person, for the payment of the $1,000 levy until about October 1, 1934.

VII

Said section 206, title 26, U. S. C. A., was adopted February 26, 1926, and became effective on and after July 1, 1926. On July 30, 1926, the Commissioner of Internal Revenue with the approval of

the Secretary of the Treasury published Treasury Department
25 Regulation numbered 3911. The pertinent parts of this regulation are set forth as exhibit B in the stipulated facts filed herein. In this regulation the levy set up under the provisions of section 205, title 26, U. S. C. A., was declared to be a tax. The levy set up under the provisions of section 206 of said title 26, U. S. C. A., was declared to be a penalty. This regulation contained instructions to the officers of the Bureau of Internal Revenue to so treat and construe the said two sections in the matter of their enforcement. This regulation remained in force and effect until on or about September 13, 1934, at which time the Commissioner of Internal Revenue issued new instructions, set out as exhibit C in the stipulated facts, and in which instructions the collector of internal revenue for the district of Alabama was specifically instructed to treat the levy made by said section 206 as a tax and not a penalty, and directing him to proceed to collect the same as a tax. No demand was made upon the defendant herein by any officer of the Bureau of Internal Revenue for payment of the $1,000 levy until on or about October 1, 1934.

CONCLUSIONS OF LAW

A. The court finds as a conclusion of law from the facts found, that the defendant is not guilty and should be discharged.

B. The court finds as a conclusion of law from the facts
26 found, that section 206, title 26, U. S. C. A., is invalid. That the levy therein set up is a penalty and not a tax. That defendant is accordingly not guilty and should be acquitted.

Given at Birmingham, Alabama, this the 3rd day of December 1934.

_____,
United States Judge.

Order of court denying defendant's findings of facts

The court found the facts stated in the findings of facts presented by the defendant above set out to be true but being of the opinion that all the facts except those stated in the first paragraph of the stipulation to be irrelevant, excluded the same from its consideration, to which action of the court, the defendant then and there duly excepted.

Given this 3rd day of December 1934.

W. I. GRUBB,
District Judge.

27 In United States District Court

Findings of facts and conclusions of law

Filed in open court December 3, 1934

From the evidence stipulated in and offered on the trial of this case the court finds specially the facts here to be:

I

The court finds the pertinent and legal facts herein to be as contained in paragraph one of the stipulation of facts filed herein, which paragraph begins "It is agreed by and between the parties hereto" and ends with the words, "without having first paid such $1,000.00."

II

The court further finds that the facts as stipulated between the parties and as contained in the remaining paragraphs of said written stipulation of facts are true, as in such paragraphs stipulated, but, upon objections interposed thereto by the United States Attorney, the court excludes such facts except the statutes and stipulations which are judicially known as being irrelevant and
28 illegal to any of the issues involved in this case, to which ruling of the court defendant duly excepts, and such exception is duly allowed.

CONCLUSIONS OF LAW

The court found as a conclusion of law from the facts found that the defendant had violated section 206. That the said section provided for a tax and not a penalty and that the tax so provided, was a valid tax. To which action of the court defendant duly excepts; exception allowed.

Given at Birmingham, Alabama, this the 3rd day of December
" 1934; defendant excepts; exception allowed.

W. I. GRUBB,
United States District Judge.

In United States District Court

Motion to find the defendant guilty

Filed December 3, 1934

Now comes the United States of America in the above-entitled cause and moves the court to render a judgment herein finding the defendant guilty as charged in the information heretofore
29 filed in said cause, and as grounds therefor, assigns, separately and severally, the following grounds:

1. That upon the facts as contained in paragraph no. 1 of the stipulation of facts filed in this cause, the defendant is clearly guilty of the offense charged against him in the information.

JIM C. SMITH,
United States Attorney.

Motion granted this 3rd day of December, 1934, defendant excepts.

W. I. GRUBB,
United States District Judge.

In United States District Court

Motion to find defendant not guilty

Filed in open court December 3, 1934

Now comes the defendant in the above-styled cause, who has heretofore in writing waived trial by jury, and moves the court that he the said defendant be found not guilty upon the information heretofore filed in said cause; and as grounds therefor assigns, separately and severally each of the following separate and several grounds:

1. Upon each of the separate and several grounds assigned heretofore by the said defendant in his demurrers to the said information heretofore filed in this cause.

2. Upon each of the separate and several grounds assigned heretofore by the said defendant in his motion to quash the said information heretofore filed in this cause.

3. For that the law applicable thereto and the facts stipulated to be true in this cause establish the innocence of this defendant.

4. For that the facts stipulated to be true in this cause, and the law applicable thereto, establish that this defendant is not guilty of the crime charged.

W. S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

ORDER OF COURT

Motion overruled, defendant excepts, this December 3rd, 1934.

W. I. GRUBB,
District Judge.

In United States District Court

Judgment and sentence

Monday, December 3rd, 1934

This District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to ad-

journment; present, Honorable W. I. Grubb, United States
31 District Judge, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States attorney; Thos. J. Kennamer, United States marshal; and W. S. Lovell, clerk.

UNITED STATES OF AMERICA

vs.

GUS CONSTANTINE, ALIAS DR. GUS

This case having been called for trial upon a criminal information heretofore filed by the United States attorney, Mr. Jim C. Smith, United States attorney, appeared for the Government and Hill, Hill, Whiting, Thomas & Rives appeared for the defendant, the defendant also appearing in person.

Thereupon, the defendant files and interposes a demurrer to the information and said demurrer being duly considered and the premises understood by the court, it is:

Ordered, adjudged, and decreed by the court that said demurrer be and the same hereby is overruled, to which action of the court the defendant duly reserves an exception, which is allowed.

Thereupon, the defendant files and interposes a motion to quash the information and the same being considered and understood by the court, it is:

Ordered, adjudged, and decreed by the court that said motion be, and the same hereby is denied, to which action an exception is duly reserved to the defendant, which is allowed.

32 And thereupon, the defendant appearing in person and being arraigned upon said information, entered a plea of not guilty thereto. And thereupon, the defendant filed a written waiver of his right to a trial by jury in this cause, which is assented to by the United States attorney, and the trial of this cause is begun. The parties hereto having stipulated and agreed upon the facts, subject to legal objections thereto, and after a consideration of the evidence and the law, the court finds the facts in accordance with written stipulation this day filed, and is of the opinion and so finds from the evidence legally admissible, that the defendant is guilty as charged in the information filed against him.

And thereupon, the defendant, being inquired of and showing no good or sufficient excuse why judgment should not now be pronounced upon him, it is:

Considered, ordered, and adjudged by the court that for the offense charged against him, the defendant, Gus L. Constantine, alias "Dr. Gus", be and he hereby is sentenced to pay a fine of two hundred and fifty dollars ($250.00) and that he remain imprisoned in

the common jail of Jefferson County, Alabama, until said fine is paid, or until he is otherwise discharged by law.

Done in open court this 3rd day of December, A. D., 1934.

W. I. GRUBB,
United States District Judge.

33 In United States District Court

Bill of exceptions

Filed December 26, 1934

Be it remembered that heretofore and on, to wit, the 3rd day of December, 1934, at a stated term of said court begun and holden in Birmingham in and for the Northern District of Alabama, before his honor, W. I. Grubb, district judge, which term is not yet adjourned, the above-captioned cause came on for trial, and the following proceedings were had not appearing otherwise of record:

By consent of all parties hereto, and for the sake of brevity as and for a bill of exceptions the stipulated facts appearing at pages 15 to 22 of this transcript, are hereby referred to and by such reference incorporated in and made part of this bill of exceptions as fully as though the same were set forth herein in haec verba.

The said stipulated facts was all and the only evidence in the case. The evidence was duly closed.

The defendant then presented to the court written findings of fact, numbered I to VII, both inclusive, with the request that the same be entered and allowed. Upon consideration of the same, the court made and entered an order thereon, finding the facts stated in said findings so presented by the defendant to be true, but

34 being of the opinion that all of the facts except those stated in the first paragraph of the stipulation of fact were irrelevant, excluded the same from its consideration, to which action of the court the defendant then and there duly excepted, which exception was allowed. The said findings of fact and the order of court made thereon appear at pages 22 to 27 of this transcript and are hereby referred to, and by such reference made part hereof as fully as though the same were set forth herein in detail.

The plaintiff, the United States of America, then presented to the court written findings of fact numbered I and II, with the request that the same be entered and allowed, which findings of fact were given and allowed by the court as a findings of fact in this cause, to which action of the court the defendant then and there excepted, which exception was allowed. The said findings of fact as given and the order made and entered allowing the same, as also defendant's exception thereto appear at pages 27 to 29 of this transcript, and are hereby referred to and by such reference made part hereof as fully as though the same were set forth herein in detail.

Thereupon the defendant moved for a judgment of acquittal. The court overruled and disallowed the motion, whereupon the defendant excepted, which exception was duly allowed. The plaintiff, the United States of America, then made a motion for a judgment of guilt, which motion was duly allowed by the court, to which action of the court the defendant duly reserved an exception, which
55 exception was duly allowed. Defendant's motion and the order and exception thereto, appear at pages 29 to 31 of this transcript. The said motions, orders, and exceptions are hereby referred to and by such reference made part of this bill of exceptions, as fully as though the same were set forth herein in haec verba.

And now in furtherance of justice and that right may be done the defendant, Gus L. Constantine, presents the foregoing as and for his bill of exceptions in the above-entitled cause and prays that the same may be settled, allowed, and filed as such.

WILLIAM S. PRITCHARD,
Of Counsel for Defendant.

APPROVAL OF COUNSEL

This is to certify that the foregoing bill of exceptions in the above-entitled cause was served on me on this the 22nd day of December 1934, and that I have carefully examined the same, and have no amendments to suggest thereto, and consent that the same may be approved by the Honorable W. I. Grubb, judge of this court, without my being present, and without further notice to me.

JIM C. SMITH,
United States Attorney.

36 In United States District Court

Order of court approving bill of exceptions

It is ordered by consent of all parties at interest that the above and foregoing be, and the same is herewith, duly signed, certified, and allowed as the bill of exceptions in this cause, and as being true and correct, and as containing all of the evidence offered on the trial of the cause, and the same is hereby made part of the record in this cause and ordered to be filed as such.

Done at Birmingham, Alabama, this the 22nd day of December 1934.

W. I. GRUBB,
United States Judge,
Trial Judge in Said Cause.

37 In United States District Court

Assignment of error

Filed December 18, 1934

Comes now the defendant, Gus L. Constantine, by his attorneys, and files and presents to the court his assignments of error herein, wherein the defendant, as appellant, assigns as error in the record and proceedings of the District Court of the United States within and for the Southern Division of the Northern Judicial District of Alabama, in the above-entitled cause, the following particulars and errors, to wit:

1. That the court erred in overruling the defendant's demurrer to the information filed on the 3rd day of December 1934, and overruled by the court on the 3rd day of December 1934; over the exception of the defendant at the time.

2. That the court erred in overruling the defendant's motion to quash the information, filed on the 3rd day of December 1934, and overruled by the court on the 3rd day of December 1934; over the exception of the defendant at the time.

3. That the court erred in holding that the facts set forth in the information and stipulation of facts constituted a crime under the laws of the United States.

38 4. That the court erred in holding that the facts set forth in the information and stipulation of facts constituted an offense under section 206, title 26, U. S. C. A. (section 701 of the Revenue Act of 1926).

5. That the court erred in overruling the defendant's written request offered to the court after the filing of the stipulation of facts agreed to as being true in this cause, wherein and whereby defendant requested the court to find the defendant not guilty, and to return a verdict of acquittal, for the reason that under the law and the evidence in this cause, no offense was committed by this defendant against the laws of the United States; and the refusal of which request was then and there excepted to by the defendant.

6. The court erred in entering judgment in favor of the United States, while in fact and in law it should have been entered in favor of the defendant.

7. The court committed error in holding that the levy imposed by section 206, title 26, U. S. C. A., was a true tax, and not a penalty.

8. The court erred in denying and refusing to grant the findings of fact as requested by the defendant.

9. The court erred, separately and severally, in excluding from the evidence separately and severally each of the findings numbered V to VII, both inclusive, as set forth in defendant's requested findings of fact.

10. The Court erred in entering the findings of fact as given in this cause, at the request of the plaintiff, United States.

39 11. The court erred in excluding from its consideration in this cause the facts found by the court to be true, but excluded from its consideration as shown and set forth in plaintiff's requested findings of fact and the order of court made and entered thereon.

Wherefore, the defendant, Gus L. Constantine, prays that the judgment of the District Court aforesaid, on the information filed herein, on account of each one of the separate and several assignments of error above set out, and for other plain and manifest errors in the record of the trial of this cause, be reviewed, reversed, and annulled, and that such further orders be made herein as are mete and proper in the premises; and that the defendant be discharged from the judgment against him and restored to all rights of which he has been deprived by reason of the verdict and judgment of the court herein complained of.

W. S. PRITCHARD, and
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Appellant.

Presented this 18th day of December 1934.

W. I. GRUBB, *District Judge.*

40 In United States District Court

Notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit

Filed December 5, 1934

Name and address of appellant: Gus L. Constantine, 630 South 18th Street, Birmingham, Alabama.

Name and address of appellant's attorney: William S. Pritchard, 210 1st Natl. Bank Bldg., Birmingham, Ala.; and Hill, Hill, Whiting, Thomas and Rives, Montgomery, Alabama.

Offense: Violation of section 206, title 26, U. S. C. A.

Date of judgment: December 3rd, 1934.

Brief description of judgment or sentence: Sentenced to pay a fine of $250 to stand committed.

Name of prison where now confined if not on bail: On bail of $500.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment above mentioned on the grounds set forth below.

(Signed) GUS L. CONSTANTINE,
Appellant.

Dated: December 4, 1934.

41 Grounds of appeal:

1. The court committed error in overruling the demurrers filed by the defendant to the information, the basis of this proceeding, separately and severally upon each of the separate and several grounds set forth in the demurrers hereunto filed herein.

2. The court committed error in overruling the defendant's motion to quash the information, filed by the defendant in this cause, to said information, the basis of the proceeding against him, separately and severally upon each of the separate and several grounds set forth in the said motion to quash heretofore filed herein.

3. The court committed error in finding the defendant guilty and imposing the sentence as imposed herein under the law and stipulated facts of this case.

4. The court committed error in refusing defendant's request to find defendant not guilty under the law and stipulated facts herein.

Service accepted 12-5-34.

JIM C. SMITH,
U. S. Attorney.

42 [Bond on appeal for $200 approved and filed Dec. 4, 1934, omitted in printing.]

44 In United States District Court

Stipulation as to transcript of record

Filed December 26, 1934

It is hereby stipulated by counsel representing the government and counsel representing the defendant in the above-entitled cause that in making up the record herein for transmission to the United States Circuit Court of Appeals for the Fifth Circuit that the clerk of the District Court for the Southern Division of the Northern District of Alabama, shall include therein only and in the order named the following:

1. The information.
2. The demurrer of the defendant to the information.
3. Order overruling the demurrer and defendant's exception thereto.
4. Defendant's motion to strike the information.
5. Order disallowing the motion to strike, and defendant's exception thereto.
6. Written stipulation waiving trial by jury.
7. Defendant's plea of not guilty.
8. Facts as stipulated.
9. Defendant's requested findings of fact, conclusions of law and order thereon; and defendant's exception thereto.

45 10. The court's findings of fact and conclusions of law. Defendant's exception thereto.

11. Motion of United States to find defendant guilty and order thereon, and defendant's exception thereto.
12. Defendant's motion for judgment of acquittal. Order of court thereon and defendant's exception thereto.
13. Judgment and sentence and judgment of the court.
14. Bill of exceptions.
15. Assignments of error.
16. Notice of appeal and citation.
17. This stipulation.

JIM C. SMITH,
United States Attorney.
WILLIAM S. PRITCHARD,
Of Counsel for Defendant.

46 [Clerk's certificate to foregoing transcript omitted in printing.]

47 [Minute entry of argument and submission, February 20, 1935, omitted in printing.]

48 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7627

GUS L. CONSTANTINE, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Alabama

March 15, 1935

Before BRYAN, HUTCHESON, and WALKER, Circuit Judges

Opinion of the Court Filed—March 15, 1935.

HUTCHESON, Circuit Judge: Appellant Constantine was convicted of violating sec. 701, Revenue Act of 1926, sec. 206, title 26, U. S. C. A. He was, and for more than a year before the information was filed, had been engaged in Birmingham, Alabama, in the business of a retail liquor dealer in malt liquors having an alcoholic content of more than ½ of 1%. For the year 1933–34 he paid the $20 tax prescribed by sec. 205 (c) 26 U. S. C. A., for retail dealers in malt liquors. For the year 1934–35 he paid the $25 tax prescribed by sec. 205 (a) 26 U. S. C. A., for retail liquor dealers.
49 When these respective payments were made, though to deal in malt liquors as he was proposing to do was in violation of

the laws of the city of Birmingham and the State of Alabama, this was all the tax that was demanded of him. He was not requested to pay the special excise tax of $1,000 imposed by sec. 701, act of 1926, for the failure to pay which he has been prosecuted. He supposed, and with reason, that he was fully paying all the taxes the Government would require of him, for at that time what is now claimed to be a tax, was by the Treasury ruling and by Department regulations and practices, declared and recognized not to be a tax, but a penalty.[1] The district judge found the facts of departmental and administrative acts and rulings to be as set out in note 1, but he thought them immatedial. He thought the intention and effect of the statute to impose a tax plain on its face; that the tax was valid, and that the defendant, having failed to pay it, was subject to be prosecuted and convicted under it. We do not find the statutory intent and effect so plain as that its history and administrative interpretation may not be looked to for the light they throw. Nor, looking to them and construing the statute with their aid, are we able to agree with the district judge that it impose a tax, rather than a penalty. We agree rather with appellant, that the
50 statute did not attempt to, it did not, impose a tax; that it imposed a penalty as part of the enforcing machinery of the eighteenth amendment, and fell with it. We think that the language of the act,[2] in requiring all kinds of handlers of intoxicating liquors to pay the same amount, instead of, as liquor taxing acts do, making the exaction fit the business done, its history from its first introduction on February 24, 1919,[3] after the passage of the

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Note 1. By Treasury Decision No. 3911 the Department, on June 30, 1926, under taxes classed as penalties, placed that prescribed by sec. 701. On October 4, 1933, after the repeal of the eighteenth amendment, the Commissioner of Internal Revenue issued a mimeograph, #4077, XII–2 C B 500, with regard to internal revenue taxes and duties, continuing with the repeal of the eighteenth amendment. The imposition of sec. 701 was not in this list. The collector of the district of Alabama issued a circular to all beer and liquor dealers—"There is enclosed herewith form 11, on which you are privileged to make application for special excise stamp as a dealer in alcoholic beverages. * * * The rates for the fiscal year, July 1934 to June 1935 are retail liquor dealers, $25." No reference was made in this circular to the tax now claimed. It was only in September 1934 when a change of policy occurred, that the special excise tax imposed by sec. 701 was declared to be a true tax and not a penalty, and the collector of the Alabama District was instructed to collect it, issuing receipts for the $1,000 until stamps could be printed.

Note 2. Miscellaneous Occupational Taxes, sec. 701. "On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by sec. 701 of the Revenue Act of 1924, a special excise tax of $1,000 in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, or manufacturer of stills, as defined in sec. 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

"Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both." Vol. 44, Stats. at Large, p. 95.

Note 3. As it then appeared sub. 12, sec. 1001, Special Taxes, 40 Stats. at Large, p. 1128, its substance was the same as the 1926 enactment, except that instead of providing for the levy of "a special excise tax of $1,000" in the case of the persons affected, it provided that they "shall pay in addition to all other taxes, special or otherwise, imposed by existing law or by this act, $1,000." Another difference between the two acts is that the first did not affix a penalty as the 1926 act did, for engaging in business without paying the $1,000. In 1921 it was reenacted as sub. 12, sec. 1001, Miscellaneous Occupational Taxes, 42 Stats. at Large, 296. In 1924 it was reenacted as sub. 9, sec. 701, Miscellaneous Occupational Taxes, 43 Stats. at Large, 327. Taking its final form in 1926, it has not since been reenacted.

wartime Prohibition Act and the adoption of the eighteenth
51 amendment, the judicial construction [4] given to this section and the general revenue acts, in relation to the National Prohibition Act in general, and sec. 35 of that act, sec 52, title 27, U. S. C. A., and sec. 5 of the Willis-Campbell Act, sec. 3, title 27, U. S. C. A., in particular, the administrative interpretation which has followed these decisions the act of March 22, 1933, 48 Stats. 16, authorizing the manufacture and sale of beer, and generally, the failure of Congress to reenact this section since the repeal of the eighteenth amendment put beyond question that its function and purpose was to penalize and prohibit; that it was enacted as a penalty, not a tax, and that it may not now, the amendment which authorized it repealed, be enforced as a penalty. Bailey vs. Drexel Furniture Co., 259 U. S. 20; Hill vs. Wallace, 259 U. S. 44.

The additional consideration, that it is gravely doubtful whether, if the act be construed as imposing an excise tax, it would be valid, since applicable to some States and portions of States and not to others, it is wanting in that geographical uniformity esesntial to the valid exercise by Congress of such taxing power, further impels to the view that the imposition of the act is not a tax, but a penalty. Knowlton vs. Moore, 178 U. S. 41; Flint vs. Stone-Tracy Co., 220 U. S. 107; Florida vs. Mellon, 273 U. S. 12. It is of course not doubted that Congress may penalize and discourage by taxing, and that the fact that a tax so operates is no objection to it as a tax. United States vs. Yuginovich, 256 U. S. 450, and cases cited in it. Alaska Fish Co. vs. Smith, 255 U. S. 44; One Ford Coupe vs. United States, supra. Particularly is it true that the fact that a business is prohibited by a State law does not prevent the imposition of a Federal tax upon it. License Tax Cases, 72 U. S. 462. It is also certainly true that what is named and exacted as a tax is not converted into a penalty merely because the main purpose and effect of its imposition is to act at a deterrent. In each case
52 of doubt whether an act imposes a penalty or a tax, the question must be determined upon a consideration of its language, its operation and effect, and particularly of the consequences which one or the other construction will entail. It is a cardinal rule that "Where a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute." Knowlton vs. Moore, supra. And another such rule is that "A statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." United States vs. La Franca, supra. Baender vs. Barnett, 255 U. S. 244; United States vs. Jin Fuey Moy, 241 U. S. 394.

Note 4. United States vs. Yuginovich, 256 U. S. 450, United States vs. Stafoff, 260 U. S. 477; Lipke vs. Lederer, 259 U. S. 560; United States vs. La Franca, 282 U. S. 568; United States vs. One Ford Coupe, 272 U. S. 321; Fontenot vs. Accardo, 278 Fed. 871.

The application of these rules to the construction of this statute leaves us in no doubt that we must construe its imposition as a penalty, and not as a tax. Its lumping under one head, and subjecting to one tax all persons engaged in any branch of the liquor business, instead of classifying them and taxing each in accordance with the business he engages in, as revenue acts commonly do, is highly significant that the act was intended to be, and was a penalty measure. Significant, too, is its ambulatory character, applying not by application in particular localities of a rule geographically uniform, but by its own terms now here, now there, in this or that State, this or that locality according to State laws or local conditions. The administrative rulings and acts of departmental officers treating it as a penalty section when enacted, and as repealed with the amendment, when considered by themselves, have the same significance. When all of these things are considered in connection with the inconvenience and injury to the revenue of this prohibitive exaction, and
the injustice to the dealers who, in reliance upon these rulings,
53 have paid the taxes demanded, it stands out more clearly that this is the more reasonable view. When, in addition to all of this, the doubtful constitutionality of the section for want of geographical uniformity; if construed as a taxing act, is considered, we think assurance is made doubly sure that it should not be so construed.

The judgment of conviction may not stand. It is reversed and the complaint is dismissed.

54 In United States Circuit Court of Appeals

No. 7627

GUS L. CONSTANTINE

v.

UNITED STATES OF AMERICA

Judgment

March 15, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by the counsel;

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed and the complaint is dismissed.

55 In United States Circuit Court of Appeals

Petition for rehearing filed

March 25, 1935

Comes the United States of America, appellee in the above-styled cause, and petitioner herein, by its attorney, and petitions the court to grant a rehearing in this cause, and to set aside the judgment of reversed herein, on, to wit, March 15, 1935, and to render a judgment affirming the judgment in this cause rendered by the District Court of the United States in and for the Northern District of Alabama, assigning as grounds for its said petition the following:

1. The court erred in holding that section 701 of the revenue Act of 1926 (section 206, title 26, U. S. C. A.) did not impose a tax.

2. The court erred in holding that section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) did impose a penalty.

3. The court erred in holding that section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) imposed a penalty as a part of the enforcing machinery of the eighteenth amendment and fell with the repeal of said amendment.

4. The court erred in holding that the classification proved by section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) was not a reasonable one.

56 5. The court erred in holding that if section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) were construed as levying a tax, there was doubt as to its constitutionality because of lack of uniformity.

6. The court erred in holding that if the levy imposed by section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) were held to be a tax, it was not uniform in its application.

7. The court erred in holding that the District Court found the facts of departmental and administrative acts and rulings to be as set out in note 1 of the decision.

8. The court erred in holding that the facts excluded by the District Court from its consideration, said facts being contained in paragraphs 5 to 7, both inclusive, of findings of fact presented by the defendant (appellant), (Tr., p. 22), were improperly so excluded.

9. The court erred in reversing the judgment of the District Court and dismissing the complaint.

JIM C. SMITH,
JIM C. SMITH,
United States Attorney.

57 CERTIFICATE

I, Jim C. Smith, United States attorney for the Northern District of Alabama, attorney of record for the United States of America, appellee and petitioner in the foregoing petition for rehearing, do hereby certify that this petition for rehearing is presented in good faith, and that, in my opinion, the same is well founded and is not presented for the purpose of creating delay.

This the 22 day of March 1935.

JIM C. SMITH,
United States Attorney.

I hereby certify that on the 22 day of March 1935 I mailed to Honorable William S. Pritchard, attorney of record for the appellant, a copy of this application and attached brief.

JIM C. SMITH,
United States Attorney.

58 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

April 2, 1935

It is ordered by the court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

60 Supreme Court of the United States

Order allowing certiorari

Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no. 39566. U. S. Circuit Court of Appeals, Fifth Circuit. Term no. 40. The United States of America, petitioner, vs. Gus L. Constantine, alias Dr. Gus. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1935. File no. 40 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935